

Lasting Powers Of Attorney - What you need to know

What is a Lasting Power of Attorney?

A Lasting Power of Attorney (**LPA**) is a legal document which allows one person (called the donor) to give another person or persons (called the attorney(s)) the power to deal with financial and property matters on the donor's behalf.

In addition or instead the donor can grant the attorney(s) power to take decisions about the donor's personal welfare.

These powers can be especially useful if a person becomes unwell and is unable to manage physically or mentally to deal with his or her own affairs. A LPA is a document which takes effect during the donor's lifetime and is completely different from and separate to a Will.

Unlike an "ordinary" power of attorney, a LPA can continue even if the donor loses mental capacity.

A LPA must be registered with the Court of Protection before the attorney(s) can act.

Are there different types of LPA?

There are two different types of LPA.

- A "Property and Affairs" LPA gives the attorney(s) power to manage property and financial matters for the donor. This means that acting under a Property and Affairs LPA the attorney(s) can, for example, pay the donor's bills, collect income, deal with benefits and even the sale of the donor's house.

- A "Personal Welfare" LPA allows the attorney(s) to take decisions which concern the donor's personal welfare, for example whether to give or refuse consent to medical treatment, and deciding where the donor should live. Unlike a "Property and Affairs" LPA, a "Personal Welfare" LPA can only be registered and acted upon if the donor has lost mental capacity to make welfare decisions on his or her own account.

Who should I appoint as my attorney(s)?

You can choose one or more than one attorney. You can specify that they must always act together or that any one or more of them can act on your behalf independently of the others. They should be people whom you trust completely to act in your best interests.

What does an attorney have to do?

The attorney(s) must act in the donor's best interests. If acting under a Property and Affairs LPA the attorney(s) should keep the donor's money separate from their own and keep records and accounts of all transactions. The attorney(s) are not allowed to use the donor's money to benefit themselves.

Can I restrict the power my attorney(s) have?

The donor can place restrictions on the powers granted in the LPA, for example, to specify that before making a decision the attorney(s) must speak to a particular person or that the attorney(s) can deal with certain property and financial affairs but not others.

A Personal Welfare LPA can only be activated if the donor has lost the capacity to take welfare decisions for him or herself. In principle, in the case of a Property and Affairs LPA a restriction can be noted to the effect that the power may only be used if the donor should ever become mentally incapacitated. However, this could present practical problems as under the new Mental Capacity Act whether or not a person has mental capacity is an ongoing question that would need to be asked in the context of each and every particular decision or act that the attorney(s) proposed to take.

In the case of a Personal Welfare LPA if you want your attorney(s) to be able to take decisions about life sustaining treatment on your behalf then you must expressly say so in the LPA document.

You should discuss these issues with your solicitor before you make your LPA to ensure that the document best reflects your wishes and circumstances.

What might happen if I don't make a LPA?

In the absence of an Enduring Power of Attorney (made before 1st October 2007) or a LPA under the new rules, assets in an individual's sole name are effectively frozen if he or she loses the mental capacity to deal with them. In that scenario, an application would have to be made to the Court of Protection to have someone suitable appointed as "deputy" to deal with the affairs of the person who has lost capacity and the involvement of the Court maybe

necessarily ongoing. This can be a costly and drawn out process and you are forfeiting the right to choose whom you would want to manage your affairs in such circumstances. By taking action before the need arises and creating a LPA, you and your family can be saved a great deal of anxiety and expense.

Will I need to register my LPA with the Court of Protection straight away?

Your attorney(s) will not be able to act without registering the LPA at the Court of Protection (a Personal Welfare LPA can only be registered if the donor has already lost capacity to make welfare decisions on his or her own behalf).

Registration is a fairly simple process but there is a court fee involved.

If you decide not to register straight away you need to bear in mind that the registration process is likely to take at least 6 weeks and in the event of you becoming unable to deal with your financial affairs due to mental incapacity they would effectively be frozen in the meantime.

Further Information

What if I have already made an Enduring Power of Attorney?

Any Enduring Powers of Attorney that were made prior to 1st October 2007 are still valid. However, Enduring Powers of Attorney only deal with financial and property matters. If you wish to nominate someone to be able to take welfare decisions on your behalf, i.e. if you should ever lack capacity to do so yourself then you will need to make a Personal Welfare (i.e. in addition to the Enduring Power of Attorney in respect of your financial affairs).

What if I have made an Advanced Treatment Directive (or "Living Will")

An Advanced Treatment Directive (sometimes known as a Living Will) is a way of giving directions in advance about the extent of medical treatment that you would wish to receive in particular circumstances should you be unable to give directions at the time of treatment as a result of some mental incapacity. This is different from delegating power to someone else under a Personal Welfare LPA to make decisions on your behalf in that same scenario.

You should seek advice from a solicitor if you have made an Advanced Treatment Directive and wish to put in place a Welfare LPA or vice versa (as one may effectively cancel out the other) and to discuss what will best reflect your wishes and circumstances.

What if a relative has already lost mental capacity and we do not have a LPA for their affairs?

If a person is beginning to lose or is suspected of losing mental capacity, an assessment may need to be carried out by a mental health expert to decide whether that person is able to make the LPA.

A certificate of Mental Capacity is always necessary for a LPA to go ahead.

If the proposed donor does not have the required level of mental capacity when he or she signs a LPA, the LPA is not valid.

We can assist you in applying to the Court of Protection for the appointment of a deputy if it is clear that your relative cannot make a LPA in respect of his or her property and affairs. You may apply to become a deputy for your relative in order that their affairs may be managed by you under the supervision of the Court. We can handle the application process on your behalf.

This fact-sheet is intended only as an initial guide based on current laws and general principles and is no substitute for specific advice based on your individual needs and circumstances.

For further information and advice please contact Claire Johnson at Leo Abse & Cohen on 02920 272 149 or via email at clairej@leoabse.com